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23 April 2009

IND103122.E

India: Independence of and corruption within the judicial system (2007 - April 2009)
Research Directorate, Immigration and Refugee Board of Canada, Ottawa

Transparency International (TI) provides the following summary of India's judicial system:

India's court system consists of a Supreme Court, high courts at state level and subordinate courts at district and local level. The Supreme Court comprises a Chief Justice and no more than 25 other judges appointed by the president. The Supreme Court has a special advisory role on topics that the president may specifically refer to it. High courts have power over lower courts within their respective states, including posting, promotion and other administrative functions. Judges of the Supreme Court and the high court cannot be removed from office except by a process of impeachment in parliament. Decisions in all courts can be appealed to a higher judicial authority up to the Supreme Court level. (2007, 215)

Article 50 of the *Constitution of India* provides for the independence of the judiciary, stating that "[t]he State shall take steps to separate the judiciary from the executive in the public services of the State" (India 1 Dec. 2007, Art. 50).

Article 124 of India's Constitution states the following in regard to appointment, tenure and impeachment:

(2) [e]very judge of the Supreme Court shall be appointed by the President ... after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President deems necessary for the purpose and shall hold office until he attains the age of sixty-five years.

... .

(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. (ibid., Art. 124 (2) and (4))

As of April 2009, no instances of impeachment have been reported; there was an attempt to impeach Supreme Court Justice V. Ramaswami in 1991 for "misuse of office," but the motion did not pass in the Lok Sabha (the lower house of parliament) (DNA 21 Feb. 2009; *The Times of India* 9 Sept. 2008). According to a 17 March 2009 *Times of India* article, a "chargesheet" detailing accusations against High Court Justice Soumitra Sen, as well as his defence, has been prepared by a panel of judges, which will enable members of parliament to debate a motion to impeach him. Justice Sen of the Calcutta High Court was found guilty of misappropriating "sale proceeds" when he was an advocate in the 1990s, although he later repaid the money at the request of the High Court (*The Times of India* 17 Mar. 2009; *India Today* 9 Sept. 2008). According to *India Today*, Sen was found guilty of "misconduct," but was subsequently elevated to the High Court in 2003, while still in possession of the money (9 Sept. 2008).

In 1993, nine judges of the Supreme Court developed a new system for the appointment of judges to the high courts (CJAR 12 Oct. 2007; see also *The Hindu* 19 Feb. 2009). This system established a "collegium" of senior judges of the Supreme Court to select candidates and make recommendations to the government regarding appointments (CJAR 12 Oct. 2007; *The Hindu* 19 Feb. 2009).

According to Shanti Bhushan, a former law minister in India writing on behalf of the Campaign for Judicial Accountability and Judicial Reform (CJAR), an organization whose objective is to apply "grassroots pressure" on the implementation of judicial reform in India (n.d.a.), the recommendations of the collegium were "binding" on the government (CJAR 12 Oct. 2007). The government could "return the recommendation [of the collegium] once, but subsequently if it was unanimously reiterated by the collegium, it would have to be implemented" (ibid. 12 Oct. 2007). Shanti Bhushan further states that this system was developed in order to protect the independence of the judiciary, but he also indicates that the system's "performance has been disappointing," because it has not been transparent (ibid.). According to a 19 February 2009 article in *The Hindu*, the collegium's "selection process is kept

secret from the Bar, the legislature and the people." The Asian Legal Resource Centre (ALRC) similarly states that the selection process for judges of the higher judiciary is "non-transparent," additionally stating that "all attempts to make the process transparent have been resisted by the judiciary thus far" (25 Sept. 2007).

According to the World Bank, "[a]lthough India's courts are notoriously inefficient, they at least comprise a functioning independent judiciary" (World Bank n.d.). The World Bank also indicates that in many states corruption investigations have "increased significantly" (n.d.). However, TI states that despite constitutional provisions for the independence and accountability of the judiciary in India, "corruption is increasingly apparent" (2007, 215).

As evidence of corruption, TI cites a high-profile case, wherein 9 people, including a politician's son, were acquitted of their alleged involvement in the murder of Jessica Lal (2007, 215). However, following extensive media exposure, the case was reopened and the son of a senior Haryana Congress leader was convicted of the murder, while two others were convicted of conspiracy and destruction of evidence (Rediff.com 18 Dec. 2006).

Though TI indicates that the upper judiciary "is relatively clean," it states that "[i]n the broader justice institutions corruption is systemic" (2007, 215). Specifically, TI indicates that "[t]here is a high level of discretion in the processing of paperwork during a trial and multiple points when court clerks, prosecutors and police investigators can misuse their power without discovery" (2007, 215). TI additionally indicates that corruption is often caused by case delays and judge shortages, explaining that civilians "seek shortcuts through bribery, favours, hospitality or gifts" (2007, 215-216).

In a 1 April 2009 telephone interview, the South Asia Desk Program Officer of the Asian Human Rights Commission (AHRC), who is a lawyer from India, stated that if we are to consider corruption not in strictly financial terms, but also in terms of favours to family members, for instance, then "an alarming number of justices are corrupt" in India. The AHRC Program Officer also stated that "it is possible for justices in India to be bribed, to falsely accuse someone or to falsely acquit someone" (1 Apr. 2009). According to a statement issued by the ALRC, a former Chief Justice of India, Justice S.P. Bharucha, suggested "that about 20 percent of the judiciary in India is corrupt," while a High Court judge suggested that the number was closer to 33 percent (25 Sept. 2007).

In regard to case backlogs, TI provides the following numbers as of February 2006: "33,635 cases were pending in the Supreme Court with 26 judges; 3,341,040 cases in the high courts with 670 judges; and 25,306,458 cases in the 13,204 subordinate courts" (2007, 215). TI specifically refers to India when stating that "lengthy adjournments force people to pay bribes to speed up their cases" (2007, xxiv). A 25 January 2008 *Indo-Asian News Service* article states that the Supreme Court had 222 cases pending decisions 6 months or more after their last hearing. The article indicates that the Civil Procedure Code does not have provisions for time limits between the hearings and the decisions (*Indo-Asian News Service* 25 Jan. 2008). The article also indicates that information on the delayed 222 cases was attained by a lawyer through the Right to Information Act (RTI) of 2005 (*ibid.*).

Citing a United Nations Development Programme (UNDP) report, Global Integrity indicates that, in India, "initiatives like Right to Information (RTI) and e-governance, [as well as] computerization of judicial records for clearing [the] massive backlog of legal cases in courts ... have been instrumental in curbing corruption in the country" (2008). However, Prashant Bhushan, a Supreme Court lawyer and member of the CJAR, alleges that the judiciary is "seeking to effectively remove itself from the purview of the Right to Information Act," using the independence of the judiciary as its justification (CJAR n.d.b).

According to Asian News International, in May 2008, the Supreme Court dismissed a petition that sought to have the assets of judges, including the Chief Justice of India, disclosed under the provisions of the RTI (15 May 2008). The article reports that the People's Union for Civil Liberties (PUCL) filed the petition arguing that the Chief Justice could not withhold asset information "on the mere ground that judges [are] Constitutional authorities" (Asian News International 15 May 2008). However, in January 2009, *The Times of India* reported that the Central Information Commission rejected the argument that the Chief Justice was exempt from the RTI, ordering the Chief Justice to disclose whether its judges were filing declarations of their assets, as per a 1997 resolution (8 Jan. 2009).

According to *The Times of India*, in September 2008, 34 sitting judges were accused of being involved in embezzlement within the Ghaziabad court system (10 Sept. 2008). Of those identified, one is a Supreme Court judge, 10 are high court judges and 23 are lower court judges (*The Times of India* 10 Sept. 2008; see also *Thaindian News* 23 Sept. 2008). *Thaindian News* reports that in September 2008 the Supreme Court gave its approval for the Central Bureau of Investigation to inquire into the allegations (23 Sept. 2008). An April 2009 *Hindustan Times* article indicates that the investigation is ongoing, stating that the Supreme Court asked for the case to be moved from a court in Ghaziabad to Delhi, due to "practical difficulties in conducting the probe" (1 Apr. 2009).

Another corruption accusation involves a former Chief Justice of India, YK Sabharwal; Sabharwal has been accused of making case decisions that furthered the business interests of his sons (*Hindustan Times* 9 June 2008; ALRC 25 Sept. 2007). A 9 June 2008 *Hindustan Times* article indicates that the Central Vigilance Commission (CVC) forwarded the complaints against Sabharwal, made by CJAR members, to the Ministry of Law and Justice for further action. No further information regarding the investigation of Sabharwal could be found among the sources consulted by the Research Directorate.

Attention to Sabharwal's case decisions were first given media exposure by Mumbai-based *Mid Day* newspaper staff, who published information indicating that Sabharwal's sons gained "material benefits out of their father's position in the Indian judiciary" (ALRC 25 Sept. 2007; CJAR 13 Oct. 2007). The editor, the resident editor, the publisher and the cartoonist of *Mid Day* were convicted of "contempt of court" (ALRC 25 Sept. 2007; CJAR 13 Oct. 2007). The four journalists were sentenced to four months imprisonment (Rediff.com 21 Sept. 2007; *Mid Day* 28 Nov. 2007). According to a 28 November 2007 *Mid Day* article, the Supreme Court stayed the prison sentence and the case was scheduled for a hearing on 16 January 2008. No further information on the case proceedings could be found among the sources consulted by the Research Directorate.

In October 2008, the Union Cabinet announced that it would introduce the Judges Inquiry Amendment Bill 2008 in parliament (*Thaindian News* 8 Oct. 2008; *Indo-Asian News Service* 8 Oct. 2008). A 20 December 2008 article in *The Statesman* reports that "increasing charges of corruption against the judiciary" precipitated the need to amend the Judges Inquiry Act of 1968. Sources indicate that the Bill carries provisions for a National Judicial Council that would function to investigate allegations of corruption and misconduct of judges from the higher judiciary (*Indo-Asian News Service* 8 Oct. 2008; *The Statesman* 20 Dec. 2008; *Thaindian News* 8 Oct. 2008). According to a document entitled "Bills Passed During 2007 - 2009" published by PRS Legislative Research, a research initiative that publishes legislative briefs on Bills in India (n.d.a.), the Judges Inquiry Amendment Bill 2008 had not been passed as of February 2009 (n.d.b.).

This Response was prepared after researching publicly accessible information currently available to the Research Directorate within time constraints. This Response is not, and does not purport to be, conclusive as to the merit of any particular claim for refugee protection. Please find below the list of sources consulted in researching this Information Request.

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Oral sources, including: The International Commission of Jurists, Global Integrity, National Human Rights Commission (NHRC), Combat Law, People's Union for Civil Liberties (PUCL), Cyrus R. Vance Center for International Justice Initiatives, *Hindustan Times*, a Professor at the National Law University of Delhi, and a Professor at the University of Michigan did not provide information within the time constraints of this Response.

Internet sites, including: American Bar Association, *Asia Times*, *Combat Law*, *The Economist*, European Country of Origin Information Network (ecoi.net), *Far Eastern Economic Review*, Global Integrity, Human Rights First, IndLaw.com, Ministry of Law and Justice - India, National Human Rights Commission (NHRC), Office of the UN High Commissioner for Human Rights (OHCHR), People's Union for Civil Liberties (PUCL), Supreme Court of India, United Nations (UN) Development Programme, UN Integrated Regional Information Networks (IRIN), UN Office on Drugs and Crime.

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